

NG GEOK HWA v. TONG CHUN SING & SONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE JC
[CIVIL SUIT NO: WA-22NCVC-165-03-2017]
25 FEBRUARY 2019

LAND LAW: *Sale and purchase agreement – Purchase of land – Parties entered into consent order for bona fide attempt to sell land for a minimum price of RM25,500,000 – Plaintiff procured an offer to purchase land by a company purchaser at RM25,500,000 – Vendor rejected company's offer to purchase land – Whether vendor unreasonably withheld agreement to sell land – Whether vendor currently negotiating with another intended purchaser to sell land at higher price – Whether vendor breached contract embodied in consent order in refusing company's offer to buy land – Whether vendor's concerns with bona fides of company's offer reasonable grounds to reject offer – Whether vendor precluded plaintiff from any further opportunity to procure purchaser by binding itself to a sale and purchase agreement with another intended purchaser – Whether vendor in breach of consent order*

CIVIL PROCEDURE: *Judgments and orders – Consent order – Sale and purchase of land – Parties entered into consent order for bona fide attempt to sell land for a minimum price of RM25,500,000 – Plaintiff procured an offer to purchase land by a company purchaser at RM25,500,000 – Vendor rejected company's offer to purchase land – Whether vendor unreasonably withheld agreement to sell land – Whether vendor currently negotiating with another intended purchaser to sell land at higher price – Whether vendor breached contract embodied in consent order in refusing company's offer to buy land – Whether vendor's concerns with bona fides of company's offer reasonable grounds to reject offer – Whether vendor precluded plaintiff from any further opportunity to procure purchaser by binding itself to a sale and purchase agreement with another intended purchaser – Whether vendor in breach of consent order*

This action concerned a dispute between the parties over a piece of land and an alleged breach of a consent order of the court. The defendant was the registered owner of a piece of land ('the land.'). On 26 December 2013, the plaintiff entered into a sale and purchase agreement with the defendant for the purchase of the land at the price of RM30 million. However, the plaintiff failed to pay the balance of the purchase price and, in consequence, the defendant forfeited the deposit paid by the plaintiff in the amount of RM2,050,000. The plaintiff did not agree with the forfeiture and so, he commenced legal action against the defendant seeking, *inter alia*, specific performance of the sale and purchase agreement between them. The

A defendant, in turn, responded with a counterclaim in Civil Suit 445 ('Suit 445'). The parties managed to settle their dispute and, as a consequence, they recorded the terms of their settlement in a consent order, in court, on 13 April 2016 ('consent order'). Unfortunately, dispute arose again between the parties in regards to the performance of the settlement embodied in the consent order, which was the subject matter of this action. Pursuant to the consent order, the plaintiff claimed that in May 2016, it had procured an offer to purchase the land by a company, Twinwood Development Sdn Bhd ('Twinwood') through the agency of a company known as Midvest Riches Sdn Bhd ('Midvest'). On 25 May 2016, Twinwood made an offer to purchase the land for RM25,500,000 upon terms and conditions therein set out ('Twinwood's offer'). Following this, the plaintiff wrote to the defendant and in this letter, and referring to the consent order, the plaintiff enclosed a copy of Midvest's solicitors' letter to them of 25 May 2016, Twinwood's cheque for RM510,000 and two copies of the letter of offer made by Twinwood. In this letter, the plaintiff also stated that the defendant was to pay Midvest's referral fee for securing, coordinating and procuring Twinwood's offer. On 20 June 2016, the plaintiff wrote to the defendant referring to, *inter alia*, the fact that Twinwood's offer had neither been rejected nor accepted by the defendant and the plaintiff referred to the deadline of 24 June 2016 for accepting Twinwood's offer set by Twinwood. On 23 June 2016, the defendant replied that it did not accept the intended purchaser's offer to purchase the land for RM25,500,000 and then enclosed by way of return, Twinwood's cheque for the sum of RM510,000. Following the defendant's rejection, the plaintiff applied to court in Suit 445 ('encl. 39') seeking, *inter alia*, a declaration that the defendant had unreasonably withheld its agreement to sell the land to Twinwood. This application was purportedly made under cl. (h) of the consent order which provided that 'parties are at liberty to apply.' The defendant informed the plaintiff that they were currently negotiating with an intended purchaser to sell the land for RM29,000,000 and invited the plaintiff to withdraw its application in encl. 39. The plaintiff did not agree to withdraw but sought documentary evidence of the negotiations. On 22 December 2016, the defendant wrote to the plaintiff attaching a copy of a sale and purchase agreement entered into on 20 December 2016 between the defendant and a company, Kemilau Idaman Sdn Bhd ('Kemilau') for the sale of the land to Kemilau ('Kemilau SPA') and demanded the removal of a caveat that had been lodged against the land by the plaintiff. The plaintiff replied stating that the Kemilau SPA was not one contemplated by the consent order and that the plaintiff would only remove its caveat upon terms, one of which was the defendant's agreement to pay the plaintiff the sum of RM2,050,000 referred to in the

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consent order. As a consequence, the defendant filed proceedings to remove the plaintiff's caveat on the land. The High Court allowed the defendant's application and the plaintiff's caveat against the land was ordered to be removed. The plaintiff's appeal against the said decision was allowed and the order of the High Court ordering the removal of the plaintiff's caveat on the land was overturned. On 10 March 2017, encl. 39 was dismissed on the basis that the matters raised were not matters decided by the court in Suit 445 and that a fresh action should be brought. Hence, the present action was commenced by the plaintiff. Relevant to the instant case was whether the defendant had breached the contract embodied in the consent order in refusing Twinwood's offer to buy the land and/or in entering into the Kemilau SPA upon the terms and conditions therein set out.

Held (judgment for the plaintiff):

- (1) Documentary evidence of the defendant's negotiations for the sale of the land at a higher price stemmed from early August 2016 after Twinwood's offer was rejected on 23 June 2016. There was no actual evidence adduced of active negotiations with Kemilau at the time Twinwood's offer was rejected. Having regard to the testimonies of DW1 and DW2 and the documentary evidence adduced, it was not established that the defendant was in fact in negotiations to sell the land for a price higher than RM25,500,000 when Twinwood's offer was rejected. (paras 47 & 48)
- (2) The defendant claimed it suspected the *bona fides* of Twinwood's offer to purchase the land because it was a dormant company. However, there was no reason why a dormant company may not be used as a vehicle to purchase and to hold property. The concern as to whether it could raise the money to purchase the land if a sale and purchase agreement was concluded ought not to pose any impediment. Payment obligations are invariably imposed on would-be purchasers in a sale and purchase agreement and the right to terminate for breach and to forfeit any deposit paid are common features of such agreements in respect of landed property. The defendant's mere concerns with the *bona fides* of Twinwood's offer were therefore not reasonable grounds upon which to reject Twinwood's offer to buy the land. (para 49)
- (3) Clause 2(f) of the consent order made reference to an offer procured either by the plaintiff or the defendant. It could not be that this literally meant that the plaintiff must personally procure the making of an offer to purchase the land. It would be quite impossible for the defendant as a company to procure a purchaser without the agency of an individual.

- A Within the contemplation of cl. 2(f) of the consent order, and the parties' procurement of an offer for the land, is the use of agents by the parties to locate potential buyers. The payment of an agency fee would also be within the contemplation of the consent order. In the instant case, the vendor of the land was in fact the defendant, and there was no reason
- B why it should not bear Midvest's agency fee. It was also incorrect to contend that having to bear Midvest's fee would mean that the purchase price offered was below the minimum of RM25,500,000. It would be so only if one deducted Midvest's fee from Twinwood's offer. Doing so would be mixing up the purchase price offered by one party, Twinwood, and the fee payable to another, Midvest. Twinwood's offer remained an
- C offer to buy for the price of RM25,500,000. Midvest's fee should not be deducted from Twinwood's offer and then to be deemed an offer at a price lower than RM25,500,000. Such an argument would mean that all offers of RM25,500,000 would never be acceptable because conveyancing fees would have to be paid and the net amount received
- D by the defendant would be less than RM25,500,000. It was not reasonable for the defendant to reject Twinwood's offer just because it contained a requirement that the defendant bore Midvest's referral fee. (paras 57 & 58)
- E (4) The consent order provided for a *bona fide* attempt by the parties to sell the land for a minimum price of RM25,500,000. However, in doing so, the consent order did not merely set the parties off to try to sell the land but was crafted in such a manner that it placed upon the defendant an obligation not to unreasonably withhold its consent to sell should an
- F offer to buy at RM25,500,000 be procured by the plaintiff. If the defendant unreasonably withheld its agreement to such an offer, it had to refund the RM2,050,000 to the plaintiff. (paras 60 & 61)
- G (5) It was not open to the defendant to contend that it was not unreasonable to refuse Twinwood's offer because there was still time to look for a higher offer. This argument, if taken to its full extent, would mean that the defendant may always so contend so long as there was still some time left of the 24 months under the consent order. This, however, did not take into account the imponderables as to when a purchaser with a suitable offer would be found, if at all. Such an interpretation would afford the defendant a licence to embark on an indeterminable search for
- H the right price until there was no time left for any contract, even if secured, to be completed within the prescribed time. Bearing these considerations in mind, cl. 2(f) did impose an obligation on the part of the defendant to accept an offer, procured by the plaintiff, to buy the

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land for RM25,500,500 and which offer the defendant may not unreasonably refuse. The obligation was therefore to accept such an offer when made, unless there existed a reasonable ground, or grounds, not to do so. In this case, there was no credible evidence of any pending negotiations let alone any likelihood of securing a better price for the land than Twinwood's offer, at the time it was made. (paras 63 & 64)

- (6) The Kemilau SPA came to naught in the end. By entering into the Kemilau SPA, the defendant had bound itself to a completion date beyond the 24 months under the consent order unless there was some waiver on the part of Kemilau or for some reason Kemilau secured the development approval in a very short time and was willing to make early payment and not exhaust the time it was allowed under the Kemilau SPA. The defendant had put itself in a position such that it had no right to require that completion of the sale of the land be within 24 months of the consent order. At the same time, by binding itself to the Kemilau SPA, the defendant had also precluded the plaintiff from any further opportunity to procure a purchaser who would pay the required purchase price, or even a higher price, notwithstanding the fact that there was still some 15 months before expiry of the 24 months under the consent order. The defendant had indeed put itself out of its power to perform the consent order to secure completion of the sale of the land within 24 months under the consent order *ie* by 13 April 2018. The defendant was in breach of the consent order when it withheld its agreement and rejected Twinwood's offer. Clause 2(f) of the consent order itself catered to this eventuality and required that the defendant refund the sum of RM2,050,000 to the plaintiff. (paras 70 & 72)

Case(s) referred to:

- Ahmad Ismail v. Malaya Motor Co & Anor* [1973] 1 LNS 1 FC (*refd*)
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC (*refd*)
Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors [1981] 1 LNS 59 FC (*refd*)
Heyman and Another v. Darwins Ltd [1942] 1 All ER 337 (*refd*)
Lee Heng Moy & Ors v. Pacific Trustees Bhd & Ors [2016] 6 CLJ 368 CA (*refd*)
Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd & Ors [2008] 6 MLJ 839 (*refd*)
Opera House Investment Pty Ltd v. Devon Buildings Pty Ltd [1936] 55 CLR 110 (*refd*)
Re A Solicitor [1945] 1 All ER 445 (*refd*)
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC (*refd*)
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC (*refd*)
Universal Cargo Carriers Corporation v. Citati [1957] 2 All ER 70 (*refd*)
Zulina Mohd Omar v. Public Bank Bhd [2018] 7 CLJ 586 CA (*refd*)

A *For the plaintiff - Gan Khong Aik & Lim Bee San; M/s Gan Partnership*
For the defendant - Niak Hiong Keong & Nabila Kamarudin; M/s Christopher & Lee Ong
Reported by Suhainah Wahiduddin

JUDGMENT

B **Darryl Goon Siew Chye JC:**

[1] This action concerns a dispute between the parties over a piece of land and an alleged breach of a consent order of the court.

C **Background**

[2] The defendant is the registered owner of a piece of land held under GM1055 Lot 1478, Bukit Nanas, Daerah Kuala Lumpur, Mukim Kuala Lumpur, Negeri Wilayah Persekutuan measuring approximately 2.05 acres in area which, for convenience, shall hereinafter be referred to as the “land”.

D It is in the heart of Kuala Lumpur. The land is therefore a substantial and valuable piece of property.

[3] On 26 December 2013, the plaintiff entered into a sale and purchase agreement with the defendant for the purchase of the land at a price of RM30 million. Unfortunately, thereafter, a dispute arose between the parties. It was alleged that the plaintiff had failed to pay the balance of the purchase price and in consequence the defendant forfeited the deposit paid by the plaintiff. The deposit forfeited was RM2,050,000. The plaintiff did not agree with the forfeiture and so he commenced legal action against the defendant seeking *inter alia* specific performance of the sale and purchase agreement between them. The defendant, in turn, responded with a counterclaim. This was in Civil Suit No. 22NCVC-445-08-2015 (“Suit 445”).

[4] Suit 445 however, was never tried. The parties managed to settle their dispute and, as a consequence, they recorded the terms of their settlement in a consent order, in court, on 13 April 2016 (“consent order”). The consent order plays a pivotal role in this case and it is therefore necessary to set it out *verbatim*:

CONSENT ORDER

H UPON THIS MATTER coming up for hearing/mediation on this day in the presence of Mr. Gan Khong Aik (together with Ms. Lim Bee San), Counsel for the Plaintiff and in the presence of Mr. HK Niak (together with Ms. Nabila Kamarudin), Counsel for the Defendant, and in the presence of Dato. Ng Geok Hwa, the Plaintiff and Mr. Tong See Wong, the Director and representative of the Defendant, BY CONSENT AND WITHOUT ANY ADMISSION OF LIABILITY, it is hereby ordered as follows:

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1. That this Consent Order herein shall constitute a full and final settlement of all claims by the Plaintiff against the Defendant and of all counterclaims by the Defendant against the Plaintiff; A
2. It is hereby agreed by parties as follows:
 - (a) that the Plaintiff shall withdraw this action against the Defendant without liberty to file afresh and without order as to costs; B
 - (b) that the Defendant shall withdraw the counterclaim in this action against the Plaintiff without liberty to file afresh and without order as to costs;
 - (c) the Defendant shall within twenty four (24) months from the date of this Consent Order ("the period", sell and complete the sale of the land held under the title of GM 1055, Lot 1478, Bukit Nanas, Mukim Kuala Lumpur, Daerah Wilayah Persekutuan ("the Land") for the purchase price of Ringgit Malaysia Twenty Five Million and Five Hundred Thousand (RM25,500,000-00) or above and in the event of such sale, the Defendant undertakes to refund the sum of Ringgit Malaysia Two Million and Fifty Thousand RM2,050,000-00) to the Plaintiff within fourteen (14) days from the date of completion of such sale; C
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 - (d) subject to paragraphs 2(e) and 2(f) below, if the Land is unable to be sold for the purchase price of RM25,500,000-00 or above within the Period, the sum of RM2,050,000-00 shall be forfeited by the Defendant upon the expiration of the Period; E
 - (e) in the event that the sale of the Land is unable to be completed due to the default of any buyer, half of any such of deposit forfeited by the Defendant from any of such uncompleted sale shall be paid to the Plaintiff subject to the maximum sum of RM2,050,000-00 within fourteen (14) days from the expiration of the Period; F
 - (f) in the event that there is an offer of RM25,500,000-00 or above for the purchase of the Land procured either by the Plaintiff or the Defendant within the Period and the Defendant unreasonably withheld their agreement to sell and/or unreasonably refuse to complete the sale of the Land to such buyer, the Defendant shall refund the sum of RM2,050,000-00 to the Plaintiff within fourteen (14) days after the expiration of the Period; G
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 - (g) the Plaintiff undertakes to withdraw the private caveat lodged *vide* presentation no. 5044/2014 on the Land within fourteen (14) days upon receipt of written notice from the Defendant that there is proof of acceptance of an offer of purchase of the Land; and I

A (h) parties are at liberty to apply.

Dated 13th day of April 2016

[5] Unfortunately, despite this amicable resolution, dispute arose again between the parties. This time, the dispute was in regard to the performance of the settlement embodied in the consent order. This dispute then is the subject matter of this action.

The Current Dispute

[6] Pursuant to the consent order, the plaintiff claimed that in May of 2016, it had procured an offer to purchase the land by a company, Twinwood Development Sdn Bhd (“Twinwood”), through the agency of a company known as Midvest Riches Sdn Bhd (“Midvest”).

[7] On 25 May 2016, Twinwood’s solicitors, Messrs YC Pang, Chong & Gordon, wrote a letter addressed to the defendant making an offer to purchase the land for RM25,500,000 upon terms and conditions therein set out (“Twinwood’s offer”). Accompanying Twinwood’s offer was a cheque for RM510,000 being earnest deposit of 2% of the proposed purchase price of RM25,500,000.

[8] On 27 May 2016, following Twinwood’s offer, the plaintiff through its solicitors, Messrs Gan Partnership, wrote to the solicitors for the defendant, Messrs Christopher & Lee Ong, informing the latter that the plaintiff had procured an offer by Twinwood through Midvest. In this letter, and referring to the consent order, the plaintiff’s solicitors enclosed a copy of Midvest’s solicitors’ letter to them of 25 May 2016, Twinwood’s cheque for RM510,000 and two copies of the letter of offer made by Twinwood’s solicitors. In this letter, the plaintiff also stated that the defendant was to pay Midvest’s “referral fee” for “securing, coordinating (*sic*) and procuring” Twinwood’s offer.

[9] On 30 May 2016, a follow-up letter was sent by the plaintiff’s solicitors to the defendant’s solicitors enquiring after Twinwood’s offer.

[10] On 17 June 2016, Twinwood’s solicitors wrote to the plaintiff’s solicitors informing the latter that Twinwood’s offer would lapse by 24 June 2016 and in the event it was not accepted by then, Twinwood’s cheque for the earnest money of RM510,000 was to be returned.

[11] On 20 June 2016, the plaintiff’s solicitors wrote to the defendant’s solicitors referring to *inter alia*, the fact that Twinwood’s offer had neither been rejected nor accepted by the defendant. The plaintiff’s solicitors then referred to the deadline of 24 June 2016 for accepting Twinwood’s offer set by Twinwood’s solicitors.

[12] On 23 June 2016, the defendant's solicitors replied referring to a conversation between the solicitors and stated as follows: A

2. Pursuant to the said Telephone Conversation, you are informed that our client does not accept the Intended Purchaser's offer to purchase the Land for RM25,500,000.00. Hence, the said offer has been rejected by our client. B

The defendant's solicitors then enclosed by way of return, Twinwood's cheque for the sum of RM510,000. The position the defendant took was disclosed in this letter by its solicitors and it was as follows:

4. In the said Telephone Conversation, you were further informed that our client is currently negotiating with other intended purchasers wherein their offers are higher than the offer by the Intended Purchaser. In view of the higher offers given by the other intended purchasers, we are instructed that our client would be happy to consider the offer to purchase the Land for the amount not lesser than RM28,000,000.00. C D
5. Further, pursuant to the Consent Order dated 13.4.2016, our client has two (2) years to sell the Land with the minimum selling price of RM25,500,000.00. Notwithstanding the fact that there are higher offers than RM25,500,000.00, our client is not compelled to sell the Land to the Intended Purchaser before the expiration of two (2) years. E

[13] On 29 June 2016, the plaintiff's solicitors wrote to the defendant's solicitors stating *inter alia*:

2. In the absence of your confirming the acceptance of any better offer before rejecting the offer from the Intended Purchaser ("the offer") which renders the offer to lapse, our client holds it against your client that your client would complete the sale of the Land at the purchase price of not lesser than RM28,000,000-00. F
3. If the sale of the Land is not completed, our client would treat such event of rejection of the offer by your client in the present circumstances as constituting unreasonable withholding of the agreement to sell on the part of your client pursuant to paragraph (f) of the Consent Order dated 13.4.2016 and our client is entitled to the refund of the RM2,050,000-00 deposit. G

[14] On 21 October 2016, following the defendant's rejection of Twinwood's offer, the plaintiff applied to court in Suit 445 ("encl. 39") seeking, *inter alia*, a declaration that the defendant had unreasonably withheld its agreement to sell the land to Twinwood. This application was purportedly made under cl. (h) of the consent order which provided that "parties are at liberty to apply". H I

A [15] On 31 October 2016, the defendant's solicitors wrote to the plaintiff's solicitors informing the latter that, "Currently, we are negotiating with an intended purchaser on our client's behalf to sell the land for RM29,000,000" and invited the plaintiff's solicitors to withdraw its application in encl. 39. The plaintiff did not agree to withdraw encl. 39 but sought documentary evidence of the negotiations.

B [16] On 1 November 2016, the defendant's solicitors wrote to the plaintiff's solicitors stating, *inter alia*:

C 2. Please find attached herein the letter dated 31.10.2016 evidencing that we are actively negotiating the sale of the Land on our client's behalf and parties are in the midst of reviewing the terms of the Sale and Purchase Agreement. We reiterate that our client is currently negotiating the sale of the Land for RM29,000,000.00. Please note that the identities of the intended purchaser and its solicitors have been blanked out in the said letter dated 31.10.2016 for the reasons of confidentiality.

D [17] The defendant was again invited to withdraw encl. 39. However, the letter of 31 October 2016 that was attached, after the redactions, merely disclosed that a draft sale and purchase agreement had been sent by the defendant's solicitors for perusal with a caveat that the defendant reserved its right to make further amendments to the terms, if necessary.

E [18] On 22 December 2016, the defendant's solicitors wrote to the plaintiff's solicitors attaching a copy of a sale and purchase agreement entered into on 20 December 2016 between the defendant and a company known as Kemilau Idaman Sdn Bhd ("Kemilau") for the sale of the land to Kemilau ("Kemilau SPA"). At the same time, the defendant's solicitors demanded the removal of a caveat that had been lodged against the land by the plaintiff.

F [19] On 6 January 2017, the plaintiff's solicitors replied stating that the Kemilau SPA was not one contemplated by the consent order. The defendant's solicitors were also informed that the plaintiff would only remove its caveat upon terms, one of which was the defendant's agreement to pay the plaintiff the sum of RM2,050,000 referred to in the consent order.

G [20] As a consequence, the defendant filed proceedings to remove the plaintiff's caveat on the land. On 3 May 2017 the High Court allowed the defendant's application and the plaintiff's caveat against the land was ordered to be removed. The plaintiff appealed.

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[21] On 10 March 2017, encl. 39 was dismissed on the basis that the matters raised were not matters decided by the court in Suit 445 and that a fresh action should be brought. Hence, the present action was commenced by the plaintiff.

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[22] On 7 December 2017, the Court of Appeal allowed the plaintiff's appeal and the order of the High Court ordering the removal of the plaintiff's caveat on the land was overturned.

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[23] However, based on the evidence of the defendant's witness, the Kemilau SPA was subsequently terminated.

The Consent Order

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[24] The consent order was dated 13 April 2016. Its terms are however deceptively simple. It is quite apparent from its terms, and the background upon which it was entered into, that the objective was to proffer an opportunity for the land to be sold at a minimum price within a prescribed period. If successful, a sum of RM2,050,000 is to be refunded to the plaintiff. This sum represents the deposit paid by the plaintiff to the defendant under the sale and purchase agreement for the land between the parties, which was the subject matter of their dispute in Suit 445.

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[25] Under the consent order, the defendant was given 24 months to "sell and complete the sale" of the land. Thus, such a sale and its completion must occur by 13 April 2018. If this were to occur, the defendant undertook to refund the plaintiff the said sum of RM2,050,000. If the land was not sold for RM25,500,000 or more within the time prescribed, the sum of RM2,050,000 shall be forfeited by the defendant ie, the defendant need not refund the plaintiff the RM2,050,000 deposit.

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[26] Having regard to this basic idea under the consent order, it would therefore be in the defendant's benefit to fail in selling and completing the sale of the land by 13 April 2018. However, built into the consent order are safeguards. Among the safeguards are those to be found in cl. 2(f).

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[27] The safeguard in cl. 2(f) is two pronged. The first is that the defendant is permitted to procure an offer for the purchase of the land at a minimum price of RM25,500,000. This therefore secures against any inactivity on the part of the defendant to look for a purchaser, thereby allowing the prescribed time under the consent order to expire to its benefit. The second is that if the defendant "unreasonably" withholds its agreement to sell the land upon such an offer being procured or "unreasonably" refuses to complete the sale of the land to the buyer arising from such an offer, the defendant shall refund the sum of RM2,050,000 to the plaintiff.

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A [28] In this regard, it is pertinent to observe that a consent order is in its nature, fundamentally, a contract (see *Ganapathy Chettiar v. Lum Kum Chum & Ors*; *Meenachi v. Lum Kum Chum* [1981] 1 LNS 59; [1981] 2 MLJ 145 and *Lee Heng Moy & Ors v. Pacific Trustees Bhd & Ors* [2016] 6 CLJ 368). As Mohd Noor Ahmad FCJ explained in delivering the judgment of the Federal Court in *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301, at p. 311:

B 8. ... a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see para. 390 @ p. 286, *Halbury's Laws of England*, 4th edn vol. 37).
C (emphasis added)

D [29] More recently in the case of *Zulina Mohd Omar v. Public Bank Bhd* [2018] 7 CLJ 586 at p. 596, Harmindar Singh Dhaliwal JCA in delivering the judgment of the Court of Appeal stated:

E [28] Now it is trite law that a consent order, although under the seal of the court, operates as a contract and enforceable as such and its terms are to be construed in accordance with principles governing the construction of a contract (see: *S & M Shopping Arcade Sdn Bhd & Others v. Fui Lian-Kwong King Sdn Bhd* [2006] 1 LNS 174).
F (emphasis added)

F [30] Accordingly, as a contract, a consent order or judgment is to be interpreted in the same way as a contract. As Ramli Ali J (as His Lordship then was) stated in *Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd & Ors* [2008] 6 MLJ 839 at p 855:

G [41] It is trite law that a consent judgment is to be interpreted in the same way as a contract. Thus, the usual principles of contractual construction apply in the instant case: the paramount consideration is to ascertain the intention of the parties to the consent judgment. Such intention is objectively assessed by the court, in particular by reviewing the language employed in the consent judgment.
H (emphasis added)

I [31] Relevant to the instant case is therefore whether the defendant had breached the contract embodied in the consent order in refusing Twinwood's offer to buy the land and/or in entering into the Kemilau SPA upon the terms and conditions therein set out.

H The Rejection Of Twinwood's Offer

I [32] The plaintiff asserts that it was unreasonable for the defendant to have rejected the offer it procured for the purchase of the land by Twinwood for RM25,500,000.

[33] The reason given for the defendant's rejection of Twinwood's offer was that it was, "currently negotiating with other intended purchasers wherein their offers are higher than the offer by the intended purchaser." In addition, the defendant maintained through its solicitors that, "Further, pursuant to the consent order dated 13 April 2016, our client has two years to sell the land with the minimum selling price of RM25,500,000. Notwithstanding the fact that there are higher offers than RM25,500,000, our client is not compelled to sell the land to the intended purchaser before the expiration of two years."

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[34] Subsequently, the defendant gave additional reasons. It was contended that if Twinwood's offer was accepted, it would have to bear Midwest's 2% referral fee and such was not a term of the consent order. The defendant also contended that it had concerns about the genuineness of Twinwood's offer. It maintained that Midwest and Twinwood were dormant companies and the offer to purchase was questionable.

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[35] Twinwood's offer to buy the land for RM25,500,000 was rejected by the defendant on 23 June 2016.

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[36] Evidence of a draft memorandum of understanding being finalised between the defendant and a company by the name of Wangsa Virgo Sdn Bhd ("Wangsa Virgo"), for the purchase of the land for a consideration of RM30,000,000, was led by the defendant. That was on 3 August 2016.

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[37] There was also evidence led of an offer by the defendant's solicitors to the solicitors of Wangsa Virgo on 11 October 2016 to sell the land for a sum of RM29,000,000 upon terms therein set out.

[38] This was followed by evidence of a counter offer by solicitors for Wangsa Virgo to purchase the land. This counter offer was set out in a letter dated 20 October 2016 from the solicitors of Wangsa Virgo to the defendant's solicitors and the terms of the offer were therein set out.

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[39] On the same day, ie, 20 October 2016, the defendant's solicitors counter proposed to Wangsa Virgo's solicitors, its terms and conditions for the sale of the land.

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[40] Mr Tong Kheim Chaang, a director of the defendant, testified as DW1. Under cross-examination, DW1 asserted that there were prior negotiations for the sale of the land to a buyer for a sum of RM30,000,000. DW1 testified that the negotiations started somewhere in between March and April of 2016. When pressed for evidence, DW1 said that the evidence of this were contained in the WhatsApp messages admitted into evidence in bundle B2 at pp. 81 to 84. However, the first of the four WhatsApp messages

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- A tendered in evidence bore the date “13 May 2015”. This was almost one year before the consent order. The other three WhatsApp messages bore no date but it was clearly apparent that they related, and were contemporaneous, to the event disclosed in the WhatsApp message that bore the date “13 May 2015”.
- B [41] If the WhatsApp messages are examined, they only make reference to someone, an interested party, wanting to view the land. The identity of the interested party was not disclosed in the WhatsApp messages and there was no indication that negotiations, as such, were afoot.
- C [42] As for the proposal to purchase the land for RM30,000,000, DW1 under cross-examination said it was mentioned in a memorandum of understanding in the email exchanges between him and his solicitors. Upon examination, the email exchanges with references to Wangsa Virgo and a memorandum of understanding were all in early August 2016. A draft memorandum of understanding between Wangsa Virgo and the defendant
- D was attached to one of the emails and the email was dated 3 August 2016. Under cross-examination DW1 agreed that if there was any memorandum of understanding between Wangsa Virgo and the defendant, it must have been concluded after 3 August 2016.
- E [43] Ultimately the negotiations with Wangsa Virgo did not result in a concluded sale and purchase agreement between Wangsa Virgo and the defendant.
- F [44] Having regard to the evidence led and the cross-examination of DW1, the WhatsApp messages do not support the defendant’s contention that there were ongoing negotiations for the sale of the land for a price of RM30,000,000 or a price higher than RM25,500,000.
- G [45] A real estate negotiator by the name of Mr Koh Yee Cheong was also called as a witness by the defendant. Mr Koh Yee Cheong testified as DW2. He testified that he had engaged various “prospects” to procure the purchase of the land. He then provided details of his attempts. These were set out in his witness statement. The details provided were, however, all events which occurred before the consent order save for an enquiry by someone by the name of Brian Ng from Skyworld, also known as Ng Hong Haw, who approached DW2 “in or about May 2016” to enquire about the availability of the land. Based on DW2’s own evidence, there was but only an enquiry from Brian Ng. Under cross-examination there was reference to an email by Brian Ng in bundle B2 at p. 12. However, this email was dated 27 September 2016, after the rejection of Twinwood’s offer. There was a complete absence of any reliable form of evidence to support the assertion that there were
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active negotiations between the defendant and Brian Ng when Twinwood's offer was rejected. As for the actual negotiations between Brian Ng and the defendant, what DW2 actually said under cross-examination was that this occurred after 19 April. DW2 then spoke of "June or July" to finalise the deal. Apparently Skyworld was connected to Kemilau. In this regard, the testimony given by DW2 as to when actual negotiations began was somewhat vague. The closest to the suggestion of negotiations was the following testimony of DW2 under cross-examination:

KOH Actually I'm not aware about the S&P everything, because my job is after done it's, it was after the ... during the negotiation. And then after everything is confirmed, the Defendant and also the purchaser, they will liaise up directly.

GKA So when you say everything is confirmed, what do you mean?

KOH Means when the time we made up on June or July to finalise the deal and there is a mutual agreement about the pricing and everything my job is done.

[46] If indeed the outcome of the negotiations was the Kemilau SPA, that was only concluded on 20 December 2016.

[47] Documentary evidence of the defendant's negotiations for the sale of the land at a higher price stemmed from early August 2016, after Twinwood's offer was rejected on 23 June 2016. These related to the memorandum of understanding between the defendant and Wangsa Virgo. The copy of the draft memorandum of understanding which was attached to an email to the defendant's solicitor was dated 3 August 2016 and it was a reference to a purchase price of RM30,000,000. There was no actual evidence adduced of active negotiations with Kemilau at the time Twinwood's offer was rejected.

[48] Having regard to the testimonies of DW1 and DW2 and the documentary evidence adduced, I find that it was not established that the defendant was in fact in negotiations to sell the land for a price higher than RM25,500,000, when Twinwood's offer was rejected.

[49] The defendant claims it suspected the *bona fides* of Twinwood's offer to purchase the land because it was a dormant company. However, there is no reason why a dormant company may not be used as a vehicle to purchase and to hold property. The only question is whether it could raise the money to purchase the land if a sale and purchase agreement was concluded. This concern, without more, ought not to pose any impediment. Payment obligations are invariably imposed on would-be purchasers in a sale and purchase agreement and the right to terminate for breach and to forfeit any

A deposit paid are common features of such agreements in respect of landed property. The defendant's mere concerns with the *bona fides* of Twinwood's offer were therefore not reasonable grounds upon which to reject Twinwood's offer to buy the land.

B [50] The defendant also contended that the offer by Twinwood was not procured by the plaintiff. At the same time, it was contended that Midvest was also a dormant company and it was dubious whether it was in fact a property agent. However to this, there was the evidence that Twinwood's offer contained in its solicitors' letter of 25 May 2016 was in fact provided to the defendant's solicitors by the plaintiff's solicitors.

C [51] Twinwood's executive Chairman Dato' Lim Boo Kian testified as PW1. He testified that he was approached by the plaintiff who told him that the land was for sale at RM25,500,000. At the same time, he was approached by Midvest about the sale of the land. Subsequently, Twinwood decided to purchase the land and he instructed Twinwood's solicitors to liaise with the plaintiff's solicitors to make the offer to purchase the land. PW1 also testified that he spoke to SME Bank and Alliance Bank for a loan to purchase the land. A proposal for the development of the land was even submitted to Alliance Bank. This was around May and June of 2016. Learned counsel for the defendant maintained that under cross-examination, PW1 was uncertain about who contacted him first, whether it was the plaintiff or Midvest, and why the defendant should bear Midvest's referral fee if Midvest was not the defendant's agent. As such, it was contended that PW1's testimony lacks credibility and should be treated with caution.

F [52] The plaintiff also testified at the trial. He testified as PW2. He maintained that he approached both Midvest and Twinwood and, as it turned out, Midvest had also approached Twinwood. In the cross-examination of PW2, counsel for the defendant attempted to suggest that it was Midvest who approached Twinwood and not the plaintiff. This was denied by the plaintiff. The plaintiff maintained that both he and Midvest approached Twinwood independently. That was why Midvest wanted its 2% referral fee. PW2 accepted that Midvest knew of the sale of the land through him. Counsel for the defendant then cross-examined PW2 on the basis that since it was he who contacted Midvest, the latter was therefore his agent and the 2% referral fee should be borne by him.

H [53] However, viewed objectively, it is not as if the defendant contended that Midvest was its agent. It is more probable the case that the plaintiff had asked Midvest to look for a purchaser and it had also contacted Twinwood. The fact that Twinwood's offer made by its solicitors were made through the plaintiff's solicitors was also evidence that Twinwood's offer was procured

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by the plaintiff. Having regard to the evidence, whether directly or indirectly, it was quite clearly the case that it was the plaintiff who procured the offer made by Twinwood.

[54] It therefore remains whether it was unreasonable for the defendant to reject Twinwood's offer because it would be obliged to bear Midvest's referral fee of 2% and this meant the sale of the land would be at a price lower than RM25,500,000 and, because it wanted the opportunity to look for a higher offer.

[55] In addressing these issues, regard must be had to the consent order and its terms and in construing the terms of the consent order as a contract, the principles for doing so should be borne in mind. In *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 at pp. 193 to 195 Zainun Ali FCJ in delivering the judgment of the Federal Court set out the applicable principles for construing a contract which merit reproduction *in extenso*:

Principles Of Construction

[26] The principles of interpretation of contract are as familiar as any canons of construction would be to legal practitioners.

[27] In recent times, the restatement of principles in the landmark case of *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912-913 "(ICS)" provides a helpful starting point for the consideration of the relevant principles. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:

... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.

The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person *having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

- A (2) The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, *it includes absolutely anything which would have affected the way*
- B *in which the language of the document would have been understood by a reasonable man.*
- C (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
- D (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd [1995] 1 WLR 1 508.*
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- F (5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, *if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.* Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201:
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- H If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

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[28] However, there are reservations to a wholesale adoption and approval of the *ICS* principles. The applicability of the *ICS* principle, specially *vis-a-vis* the question of rectification of contracts, is doubted. This has been alluded to in the recent judgment of this court in *Menta Construction Sdn Bhd v. Lestari Puchong Sdn Bhd* [2015] 8 CLJ 1117 for reasons that we will not repeat here. Save for this reservation, *the remaining ICS principles, for avoidance of doubt, where it does not concern rectification – are good law.* (emphasis added)

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[56] In a similar vein, Gopal Sri Ram FCJ in the earlier decision of the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 at p. 296 stated:

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[42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v. Munawar Ali* [2001] 2 WLR 735:

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The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. *The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.* (emphasis added)

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[57] Clause 2(f) of the consent order makes reference to an offer procured either by the plaintiff or the defendant. It cannot be that this literally meant that the plaintiff must personally procure the making of an offer to purchase the land. If read literally, it would be quite impossible for the defendant as a company to procure a purchaser without the agency of an individual. To my mind within the contemplation of cl. 2(f) of the consent order, and the

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A parties' procurement of an offer for the land, is the use of agents by the parties
to locate potential buyers. If this be correct, and I do perceive it to be, then
the payment of an agency fee would also be within the contemplation of the
consent order. Such would not be extraordinary or beyond the contemplation
of the parties. Viewed objectively, it would not be unreasonable or
B unrealistic to expect that the parties, or a reasonable man, would have
expected that an agency fee might have to be paid. In the instant case, the
vendor of the land is in fact the defendant, and there is no reason why it
should not bear Midvest's agency fee. Although the sum involved may be
large, but in terms of a percentage of the purchase consideration of
C RM25,500,000, it was not suggested that 2% was particularly high or beyond
the norm. It is in this context quite significant to note that the payment of
this fee was not even a ground that was given by the defendant's solicitors
for the rejection of Twinwood's offer. This was a ground raised much later.

[58] In my view, it is also incorrect to contend that having to bear
D Midvest's fee would mean that the purchase price offered was below the
minimum of RM25,500,000, as was contended by learned counsel for the
defendant. It would be so only if one deducts Midvest's fee from
Twinwood's offer. To my mind, doing so would be mixing up the purchase
price offered by one party, Twinwood, and the fee payable to another,
E Midvest. Twinwood's offer remains an offer to buy for the price of
RM25,500,000. Midvest's fee should not be deducted from Twinwood's
offer and then to be deemed an offer at a price lower than RM25,500,000.
Taken to its logical conclusion, such an argument would mean that all offers
at RM25,500,000 would never be acceptable because conveyancing fees
F would have to be paid and the net amount received by the defendant would
be less than RM25,500,000. I therefore do not think that it was reasonable
for the defendant to reject Twinwood's offer just because it contained a
requirement that the defendant bears Midvest's referral fee.

[59] Was it then reasonable for the defendant to reject Twinwood's offer
G because it wanted to look for a higher offer for the land and had almost 23
more months left to do so under the consent order? As alluded to above, it
would be in the defendant's interest if the land is not sold and the sale
completed within 24 months of the consent order ie, by 13 April 2018.
Objectively, it cannot be the intention of the consent order that there be no
sale of the land, although it does contemplate the land not being sold and the
H defendant forfeiting the RM2,050,000 deposit paid by the plaintiff.

[60] In my view, the consent order provides for a *bona fide* attempt by the
parties to sell the land for a minimum price of RM25,500,000. However, in
so doing, the consent order does not merely set the parties off to try to sell
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the land but is crafted in such a manner that it places upon the defendant an obligation not to unreasonably withhold its consent to sell should an offer to buy at RM25,500,000 be procured by the plaintiff.

[61] If the defendant unreasonably withholds its agreement to such an offer, it has to refund the RM2,050,000 to the plaintiff. In other words, if an offer of RM25,500,000 is made, it must be accepted unless the defendant demonstrates that it was not unreasonable for it to withhold its agreement to sell. Clause 2(f) of the consent order in my view imported the concept of reasonableness couched in the negative and expressed as “unreasonably withheld”. The concept of reasonableness is one that is well known to the common law. To determine what is reasonable, one has to have regard to all the relevant circumstances. As was stated by Latham CJ in the decision of the High Court of Australia in *Opera House Investment Pty Ltd v. Devon Buildings Pty Ltd* [1936] 55 CLR 110 at p. 116. “The word “reasonable” has often been declared to mean “reasonable in all the circumstances of the case”.’ Scott LJ, in *Re A Solicitor* [1945] 1 All ER 445 at p. 446 said that:

The word “reasonable” has in law the *prima facie* meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know.

[62] This however does not take matters much further for the purposes of the case at hand, as the concept is in tandem with the principles of construction laid out by Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd (supra)*.

[63] Having regard to the factual background, the objective of the consent order and the mechanism employed by it, I do not think it is open to the defendant to contend that it was not unreasonable to refuse Twinwood’s offer because there was still time to look for a higher offer. This argument, if taken to its full extent, would mean that the defendant may always so contend so long as there is still some time left of the 24 months under the consent order. This, however, does not take into account the imponderables as to when a purchaser with a suitable offer would be found, if at all. If an offer of RM30,000,000 is made, would it still be open to the defendant to say I wish to look for a yet higher offer? The consent order may be silent about this, but objectively, I do not think that it is open to the defendant to so contend. A reasonable person would very quickly conclude that such an interpretation would afford the defendant a licence to embark on an indeterminable search for the right price until there is no time left for any contract, even if secured, to be completed within the prescribed time. If this be the case, the defendant will in effect have no obligation to sell and will not be encouraged to sell, for if the land is not sold within the prescribed time, the defendant gets to forfeit the sum of RM2,050,000.

- A [64] Bearing these considerations in mind, it seems therefore clear that cl. 2(f) does impose an obligation on the part of the defendant to accept an offer, procured by the plaintiff, to buy the land for RM25,500,000, and which offer the defendant may not unreasonably refuse. The obligation is therefore to accept such an offer when made, unless there exists a reasonable ground, or grounds, not to do so. Even if the defendant were to be in negotiations for a better price, the negotiations must at least be such that it can objectively be said that there was a likelihood that the negotiations would succeed. However, in this case, there was no credible evidence of any pending negotiations let alone any likelihood of securing a better price for the land than Twinwood's offer, at the time it was made.
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The Kemilau SPA

[65] The Kemilau SPA was entered into on 20 December 2016. The purchase price stipulated for the land was RM29,000,000.

- D [66] The Kemilau SPA was entered into with the acknowledgment of the presence of a caveat lodged by the plaintiff and it was expressly made conditional upon Kemilau obtaining several approvals from the relevant authority for Kemilau's proposal to develop the land, within 15 months from the agreement. These approvals were collectively referred to as the "development approval". This would mean that, at the latest, the development approval had to be obtained by 20 March 2018, although Kemilau may in its "absolute discretion" waive the procurement of any of the development approval. The Kemilau SPA was to become "Unconditional" upon Kemilau obtaining the development approval and the caveat on the land removed.
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- F [67] Under the Kemilau SPA, a sum of RM1,000,000 earnest deposit was required to be paid by Kemilau. This sum was made up of what was called an "initial payment" and a "retention sum". The balance of the purchase price of RM28,000,000 was to be paid in two tranches. First, a payment of RM1,900,000 within 14 working days upon the Kemilau SPA becoming unconditional. Second, within three months after the Kemilau SPA becomes unconditional, referred to as the "completion date", Kemilau was to make the final payment of RM26,100,000. However, if Kemilau failed to make the final payment within the completion date, it was to be given an automatic extension of another month to pay, subject to the imposition of interest at the rate of 6% per annum. This would mean that completion of the Kemilau SPA may only take place by 20 July 2018.
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[68] Kemilau however, did not secure the development approval it required from Dewan Bandaraya Kuala Lumpur (“DBKL”). Its application was put on hold. There appeared to have been evidence of an appeal by Kemilau against the decision of DBKL. However, DW1 when cross-examined did not know if the appeal was allowed. Suffice to say, when cross-examined, DW1 agreed that the Kemilau SPA was eventually terminated.

[69] DW1 suggested that there were many reasons why Kemilau did not obtain the approval it required from DBKL and one of them was the delay in getting the plaintiff’s caveat lifted. Upon further cross-examination, DW1 admitted that there were no reasons given by DBKL for putting on hold the approval sought by Kemilau but he claimed that he had obtained “feedback” from a telephone conversation. No particulars were offered of this telephone conversation or who DW1 spoke to.

[70] However, as stated above, the Kemilau SPA came to naught in the end. It was entered into well after Twinwood’s offer was rejected. The Kemilau SPA was entered into on 20 December 2016 which was just over eight months into the timeline of the consent order with slightly over 15 months left to go. The problem with the Kemilau SPA was that although it was for a sum higher than Twinwood’s offer, it was a contract that provided for a possible completion date after the 24 months stipulated under the consent order. It was a contract that caters for both, a completion of the sale after the time period provided in the consent order and the operation of cl. 2(d) thereunder which would allow the defendant to forfeit the sum of RM2,050,000.

[71] Under the Kemilau SPA, Kemilau was permitted 15 months to acquire the development approval, it required. It was however contended on behalf of the defendant that there was provision in the Kemilau SPA which reserved to Kemilau the right to waive the procurement of the development approval. However, I do not think it is a question of the possibility of completion occurring within the 24 months under the consent order but whether the agreement caters for the opposite, and it does. In any event, there is also nothing in evidence to suggest that Kemilau was likely to waive requiring the development approval.

[72] By entering into the Kemilau SPA upon the terms mentioned above, the defendant had bound itself to a completion date beyond the 24 months under the consent order unless there is some waiver on the part of Kemilau or for some reason Kemilau secures the development approval in a very short time and is willing to make early payment and not exhaust the time it is allowed under the Kemilau SPA. Of such a waiver or willingness to pay, there is no evidence. The defendant, by entering into the Kemilau SPA, had put itself in a position such that it had no right to require that completion

A of the sale of the land be within 24 months of the consent order. At the same time, by binding itself to the Kemilau SPA, the defendant had also precluded the plaintiff from any further opportunity to procure a purchaser who would pay the required purchase price, or even a higher price, notwithstanding the fact that there was still some 15 months before expiry of the 24 months under the consent order.

B [73] In *Universal Cargo Carriers Corporation v. Citati* [1957] 2 All ER 70 at p 85, Devlin J stated that:

C The two forms of anticipatory breach have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be inevitable; *if a man puts it out of his power to perform, the breach will be inevitable in fact – or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities*. So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable.

D (emphasis added)

E [74] Contrary to the submissions by learned counsel for the defendant, by entering into the Kemilau SPA, the defendant had indeed put itself out of its power to perform the consent order to secure completion of the sale of the land within the 24 months under the consent order ie, by 13 April 2018. The defendant had no more say. If there was to be a waiver of the need for the development approval, it was a matter entirely in the hands of Kemilau. As there is no evidence of the likelihood of such a waiver, it remains a mere or bare possibility. This state of affairs comes within the above-cited expression of the law by Devlin J (see also *Ahmad Ismail v. Malaya Motor Co & Anor* [1973] 1 LNS 1; [1973] 2 MLJ 66 and the opinion of Lord Porter in *Heyman and Another v. Darwins Ltd* [1942] 1 All ER 337 at p. 359.)

F [75] However, in the circumstances of this case, whether there was any anticipatory breach by the defendant matters not. This is because the defendant, for the reasons stated above, was in breach of the consent order when it withheld its agreement and rejected Twinwood's offer. Clause 2(f) of the consent order itself caters for this eventuality and requires that the defendant, "shall refund the sum of RM2,050,000 to the plaintiff within fourteen (14) days after the expiration of the period" and "the period" is defined as the 24 months from the date of the consent order. Accordingly, the defendant ought to have refunded the plaintiff the sum of RM2,050,000 by 27 April 2018.

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Conclusion

[76] In conclusion therefore, I find for the plaintiff in this case and it is ordered that the defendant pays the plaintiff a sum of RM2,050,000 together with interest thereon at the rate of 5% per annum from the date of judgment to the date of full payment and costs, as prayed for in para. 32(d) of the statement of claim.

[77] In the statement of claim, the plaintiff had also prayed for several declarations. These declarations were, in substance, the plaintiff's contentions leading to the desired conclusion that the defendant was in breach of the consent order thereby entitling the plaintiff to the payment claimed. It appears to be in vogue for parties to seek declarations willy-nilly, regardless of whether they are warranted or not. When the views of learned counsel for the plaintiff were sought, it appeared clearly that the declarations sought were quite unwarranted and they were withdrawn.

[78] Also sought by the plaintiff was an order that the caveat lodged by the plaintiff be maintained in light of the provision in cl. 2(g) of the consent order. Quite clearly the circumstances contemplated in cl. 2(g) were no longer applicable when cl. 2(f) was breached. Under the consent order, the breach of cl. 2(f) gives rise to the right to payment of an agreed sum of money. The plaintiff's right is therefore to be paid that agreed sum. The breach of cl. 2(f) confers no rights in the land to the plaintiff. Accordingly, the order sought that the plaintiff's caveat on the land be maintained is denied.

[79] Having heard submissions on the issue of costs, it is ordered that the defendant do pay the plaintiff costs in the sum of RM50,000.

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